UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/550,936	09/28/2005	Frans Johan Sarneel	19790-003US1	4644

26191 7590 01/13/2010

FISH & RICHARDSON P.C.
PO BOX 1022
MINNEAPOLIS, MN 55440-1022

EXAMINER	
WATTS, JENNA A	

ART UNIT	PAPER NUMBER
1794	

NOTIFICATION DATE	DELIVERY MODE
01/13/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATDOCTC@fr.com

Office Action Summary	Application No.	Applicant(s)	
	10/550,936	SARNEEL ET AL.	
	Examiner	Art Unit	
	Jenna A. Watts	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,5-13 and 16-20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,5-13 and 16-20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *28 September 2005* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/22/2009 has been entered.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

5. Claims 1, 5-13, 16, 17, 19 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fazzina et al. (U.S. Patent No. 3,852,501) in view of Suderman (U.S. Patent No. 4,588,600), further in view of Evans et al. (U.S. Patent No. 4,208,442), and in light of Kettlitz (U.S. Patent No. 6,235,894).

6. Regarding Claims 1, 7, 8 and 20, Fazzina teaches a dry mix (Column 1, lines 61-63) which provides an edible food coating that will form a continuous, crisp, fat fried-like coating when applied to a wide variety of foodstuffs (Column 1, lines 40-43 and Column 3, lines 15-17). Since the mix can be applied to a variety of foodstuffs, it is deemed a multipurpose mix. Fazzina teaches that the mix is applied or spread onto foods such as meat and subsequently baked (Column 1, lines 9-10 and line 63), thus the mix is also deemed a spread in baked savory products.

7. Fazzina further teaches that the dry mix comprises corn starch hydrolyzate in an amount of 15-35% (Column 2, lines 13-15 and 36-37), farinaceous material, which is usually a flour such as wheat, corn, etc. in an amount of 8-35% (Column 2, lines 22-23 and 37-38), modified starch, which can be partially gelatinized, in an amount of 5-18%, and shortening/fat in an amount of 10-50% (Column 2, lines 60-61 and Column 3, lines 1-2), all by weight of the final dry coating mixture. The above ingredients are deemed to meet the limitations of Claims 7, 8 and 20 because they include all or part of the range claimed by Applicant. Regarding the limitation of 25-65 wt % carbohydrates in Claim 1, Fazzina teaches that the combined amount of carbohydrates can be between 28-88 wt %, wherein 28-65 wt % meets the claimed limitation. Regarding the limitation of 15-28 wt % fat, Fazzina's teaching of between 10-50 wt % of fat/shortening meets the claimed limitation.

8. Since Fazzina teaches that wheat flour can be present, it would be expected that some amount of gluten would be present in the dry mix, however, Fazzina does not specifically teach that the proteins are vital wheat gluten present in an amount of 10-20% by weight.

9. Suderman teaches a dry edible food composition for use in imparting a baked, coated comestible the taste, texture and appearance of a fried coated comestible (Column 3, lines 58-60), which comprises a blend of flours including corn flour (Column 4, lines 40-43) and a heat coaguable protein film former such as vital wheat gluten (Column 4, lines 45-46), employed in an amount of about 0-20%, based on the weight of the dry mix (Column 6, lines 14-15), wherein the amount of vital wheat gluten taught

by Suderman meets the claimed ranges of Applicant for the amount of protein/vital wheat gluten or gluten present. Suderman teaches that the vital wheat gluten is the principle structure-building ingredient of the present invention (Column 6, lines 13-14) and further teaches that it is the intention in the present invention to use the flours more as bulking agents, and to rely on controlled amount of structure-building proteins such as vital wheat gluten, to obtain an engineered structure (Column 5, lines 30-34). Suderman further teaches that the vital wheat gluten in the mix contributes to producing a coating that forms a substantially continuous film or envelope expanded in some irregular manner, which further closely simulates the appearance of a fried product (Column 4, lines 60-65 and 18-20).

10. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the dry mix of Fazzina to further include vital wheat gluten in range of 0-20%, as taught by Suderman, because Suderman teaches that the combination of flour and vital wheat gluten in the dry mix contribute to produce a coating that forms a substantially continuous film or envelope that closely resembles a fried food product. One of ordinary skill in the art would have been motivated to add gluten in an amount of 10-20% or 12-25% by weight to the dry mix in order to produce a food product with a continuous outer coating and the taste, texture and appearance of a fried-food product.

11. Regarding Claims 7 and 8, Fazzina in view of Suderman teach the use of a modified starch that can be partially gelatinized (see Fazzina, Column 2, lines 50-51), but do not specifically teach the use of starch n-octenyl succinate.

12. Evans teaches a dry coating composition that is used to produce a baked coated comestible with a coating having a crisp texture and taste, a uniform coloration and appearance and good adhesion to the comestible surface as well as the taste, texture and appearance of a fried coated comestible (Column 1, lines 34-39 and 45-46). Evans further teaches adding a binding agent to the dry coating (Column 13-14) that is a starch modified using 1-octenyl succinic anhydride, and further teaches that this modified starch provides optimum emulsive and film-forming properties which are suitable in the instant invention (Column 3, lines 30-34). Starch 1-octenyl succinic anhydride is deemed synonymous with n-octenyl succinate in light of the evidentiary reference that teaches that n–octenyl succinic anhydride is also called n-OSA and equates it with n-octenyl succinated starches (see evidentiary reference Kettlitz, Column 2, lines 57-58 and Column 4, line 20) and Applicant refers to n-octenyl succinate as n-OSA (See instant application, Page 9, lines 10). Furthermore 1-OSA is deemed chemically synonymous with n-OSA.

13. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the dry mix of Fazzina in view of Suderman to have used n-octenyl succinate as the modified starch, as taught by Evans, because Evans teaches that n-octenyl succinate provides optimum emulsive and film-forming properties which are suitable to produce a food product with an outer coating that has good adhesion to the food product and resembles a fried food product. One of ordinary skill in the art would have been motivated to such n-octenyl succinate in order to ensure

that the coating was uniform and adhered to the food product, thereby creating a food product that resembles a fat-fried product that is desirable to consumers.

14. Therefore, regarding the limitations of Claim 1, since Fazzina in view of Suderman and Evans teach the dry mix compositions of Claims 7 and 8, it would be expected that such a dry mix would have a freeze-thaw stability of at least 98%, a baking stability of 100% and a stable viscosity under alkaline, acidic and neutral pH conditions, absent any evidence to the contrary, because since Fazzina in view of Suderman and Evans teach the claimed composition comprising the same components, the composition will react or co-act in the same manner as claimed by Applicant, and therefore, the properties of these components will necessarily be present. Furthermore, it is noted that the component and its properties are inseparable. Therefore, if the components are present, their properties would also be necessarily present.

15. Furthermore, the specific parameters of freeze-thaw stability, baking stability and viscosity that are claimed in Claim 1 are not met by any reference here because Applicant has chosen to describe his product with physical characteristics that are beyond measurement by this Office and as a practical matter, the Patent Office is not equipped to manufacture products and then obtain prior art products and make physical comparisons therewith. See In re Brown, 59 CCPA 1036, 459 F.2d 531,173 USPQ 685 (1972) at 59 CCPA 1041. Since Fazzina in view of Suderman and Evans teach the claimed components in the claimed percentages, it would be expected, absent any evidence to the contrary, that the composition would meet the claimed limitations. Thus

the previously mentioned limitations of Claim 1 are shown by the above mentioned references.

16. Furthermore, it has been found that "[T]he PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his [or her] claimed product. Whether the rejection is based on inherency' under 35 U.S.C. 102, on prima facie obviousness' under 35 U.S.C. 103, jointly or alternatively, the burden of proof is the same...[footnote omitted]." The burden of proof is similar to that required with respect to product-by-process claims. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980) (quoting In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977)). MPEP 2112.V.

17. Regarding Claims 5 and 6, Fazzina in view of Suderman and Evans are taken as cited above in the rejection of Claims 1, 7 and 8 and teach carbohydrates such as flour, starch hydrolysates, as well as emulsifying starches such as starch n-octenyl succinate (see Fazzina and Evans in the rejections of Claims 1, 7 and 8).

18. Regarding Claims 9 and 13, Fazzina in view Suderman and Evans teach a completed mix, because Fazzina in view of Suderman and Evans teach a dry flowable mix which is applied to a wetted foodstuff (see Fazzina, Column 1, lines 61-63), wherein the foodstuff is wetted with milk and then coated with the dry mix (see Fazzina, Column 4, lines 20-21). Fazzina in view of Suderman and Evans further teach that, during cooking, the shortening melts and enrobes all parts of the coating so as to spread out any material that may remain as a dry powder (see Fazzina, Column 2, lines 60-63).

Therefore, Fazzina in view of Suderman and Evans teach the importance of maintaining sufficient moisture around the food product during cooking to ensure that there is no dry powder remaining on the wetted food product.

19. It is also noted that Suderman teaches a dry mix that is combined with water and liquid oil to form a batter and such a combination may result in a liquid oil/water matrix in which the dry particles are fairly uniformly dispersed (See Suderman, Column 4, lines 8-10). Suderman teaches that the completed mix or batter is spread or applied onto a food product prior to baking (Column 3, lines 44-45). Suderman further teaches that normally this would be likely to result, on baking, in a uniform appearance and structure (See Suderman, Column 4, lines 10-11).

20. Therefore, it can be seen from the art, that it is known to either combine the dry mix with a foodstuff that has been wetted, such as in the case of Fazzina, or to combine a liquid and a dry mix and apply it to a food product, such as in the case of Suderman, both methods resulting in a uniformly coated food product that has a coating resembling a fat-fried food product. Therefore, it is known in the food industry to use such completed mixes in order to provide coatings or spreads on food products.

21. The combination of the milk and dry mix applied to the foodstuff, as taught by Fazzina, can be seen as a completed mix and can also be seen as a spread because in effect, the milk and dry mix form a coating and are thus spread or applied onto the food product prior to baking. Furthermore, Suderman teaches a completed mix that is also deemed a spread because the completed mix or batter is spread or applied onto a food product prior to baking (see Suderman, Column 3, lines 44-45).

22. Regarding Claim 10, Fazzina in view of Suderman and Evans are taken as cited above for the rejection of Claim 1 and teach a food composition comprising meat (See Fazzina, Column 1, lines 61-63) and the dry mix of Claim 1 or a completed mix as claimed in Claim 9.

23. Regarding Claims 11 and 12, Fazzina in view of Suderman and Evans are taken as cited above and teach a savory filled product, because Fazzina in view of Suderman and Evans teach a food product such as meat that is coated with a mixture of a liquid and a dry mix, which makes up the completed mix (see Fazzina and Suderman in the rejection of Claim 9). Therefore, the meat is deemed a filling of the coated food product (see Fazzina, Column 61-64). Fazzina in view of Suderman and Evans further teach that many foods, such as poultry, meat, fish and vegetables are breaded with a light coating of flour or breadcrumbs which on frying in oil develops into a characteristic crispy, brown-colored coating (see Fazzina, Column 1, lines 11-13). Suderman teaches that it is known to coat various comestibles, such as meat, with a combination of batter and breading mixes wherein the breading is relied upon to give a crispness and appearance somewhat characteristic of a fried or deep-fat fried comestible (see Suderman, Column 1, line 31 and 37-39). Therefore, the layer of breading is on and/or around the completed mix, the breading deemed synonymous with bread or bread crumbs.

24. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the food product of Fazzina in view of Suderman and Evans to have comprised a combination of batter and a breading or bread-crumb

layer, because Suderman teaches that a combination of a batter a breading are relied upon to give a crispness and an appearance reminiscent of a fried food product. One of ordinary skill in the art would have been motivated by Suderman to have included both a batter or mix along with a breading layer in order to prepare healthier baked food products for consumers that are characteristic of fried foods without the frying stage.

25. Regarding Claims 16 and 17, Fazzina in view of Suderman and Evans are taken as cited above for the rejection of Claims 1, 7 and 8, for the reasons stated above. Since Fazzina in view of Suderman and Evans teach the dry mix compositions of Claims 7 and 8, it would be expected that such a dry mix would have a freeze-thaw stability of at least 99.0%, absent any evidence to the contrary.

26. Regarding Claim 19, Fazzina in view of Suderman and Evans are taken as cited above in the rejection of Claims 1, 7 and 8 and teach a dry mix that comprises 10-50% weight % fat (see Fazzina Column 2, lines 60-61 and Column 3, lines 1-2), thus a fat % of 15-28 is also encompassed by Fazzina. Fazzina in view of Suderman and Evans further teach proteins in the range of 0-20 weight % of vital wheat gluten (see Suderman in the rejection of Claim 1, Column 4, lines 45-46 and Column 6, lines 14-15), thus a protein % of 10-20 is also encompassed by Suderman. Fazzina in view of Suderman and Evans also teach carbohydrates in the claimed range (see Fazzina in the rejection of Claim 1 and Column 2, lines 13-15 and 36-37). The dry mix can also be seen as a spread in baked savory products because Fazzina in view of Suderman and Evan teach that the mix is applied or spread onto foods such as meat and subsequently baked (see Fazzina, Column 1, lines 9-10 and line 63).

27. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fazzina et al. (U.S. Patent No. 3,852,501) in view of Suderman (U.S. Patent No. 4,588,600) and Evans et al. (U.S. Patent No. 4,208,442), and in further view of Kettlitz et al. (U.S. Patent No. 6,235,894).

28. Fazzina in view of Suderman and Evans are relied upon as above for the rejection of Claim 6.

29. Fazzina in view of Suderman and Evans are taken as cited above but do not specifically teach the use of stabilized starch n-octenyl succinate.

30. Kettlitz teaches the preparation of a heat stable high viscosity starch obtained by reacting starch or chemically modified starches with activated chlorine under alkaline conditions (Column 2, lines 48-50) and further teaches that high viscosity starches have a tendency to burst during heating which leads to a drastic viscosity breakdown and in order to overcome such undesirable viscosity breakdown, starches may be stabilized (Column 1, lines 25-28). Kettlitz further teaches that the high viscosity stabilized starches are particularly suitable in many different preparations, for example, in the preparation of meat products and convenience foods that need to have a high viscosity and smooth texture after heating (Column 1, lines 47-49 and 51-52).

31. Therefore, it would have been obvious to one of ordinary skill in the art at the time that the invention was made, for the starch n-octenyl succinate as taught by Fazzina in view of Suderman and Evans to have been stabilized starch n-octenyl succinate, because Kettlitz teaches that such stabilized starches are particularly

suitable for the preparation of meat products and convenience foods where a high viscosity and smooth texture after heating are desirable. One of ordinary skill in the art would have been motivated to use a stabilized starch in the preparation of baked and breaded meat products in order to ensure that the resulting breading/coating has a smooth and uniform texture and that the starch remains stable and viscous during heating to allow it to act as a binding agent in the coating.

Conclusion

32. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jenna A. Watts whose telephone number is (571) 270-7368. The examiner can normally be reached on Monday-Friday 9am-5:00pm.

33. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

34. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/C. SAYALA/
Primary Examiner, Art Unit 1794

/Jenna A. Watts/
Examiner, Art Unit 1794
January 6, 2010